Appendix 1.

PETITIONER CITY OF ST. LOUIS, STATEMENT, BRIEF AND ARGUMENT IN THE SUPREME COURT OF MISSOURI.

Statement.

The case at bar is a suit in equity for the cancellation of a warranty deed from appellant Anne M. Evans delivered to appellants Henry Ernst and Sarah Ernst, his wife, and a first and second deed of trust from appellants Henry Ernst and Sarah Ernst, his wife, to the trustee for J. E. Hanger and to set aside an execution sale and the deed thereunder from the Sheriff of the City of St. Louis to appellant Anne M. Evans.

This suit is the result of a sale made by the Sheriff of the City of St. Louis to appellant Anne M. Evans under date of September 14, 1935, for the sum of $85.00, which sale was made pursuant to the special execution requested by the appellant The City of St. Louis under a special benefit judgment rendered against the property involved herein on September 21, 1925, under the proceeding instituted by the City of St. Louis entitled "The City of St. Louis v. Mary Rupp et al.," for the change of grade of Clayton avenue from Kraft avenue to the city limits, as provided under ordinance 27361 of the City of St. Louis.

Under said change of grade proceeding the Circuit Court appointed commissioners as provided in Section 5 of Article XXI of the Charter to view the property to be damaged or assessed; fix a benefit or taxing district and publish a notice of said benefit or taxing district in a newspaper for ten days before beginning their assessment, and a notice of the boundaries of said benefit or taxing district, and of the time and place at which they would assess such damages and benefits, and where said commissioners would hear evidence submitted by the parties interested. Said

notice was published in the St. Louis Daily Record for a period of ten days from January 22, 1925, to and including February 2, 1925 (Appellant's Abstract, page 78).

The commissioners appointed in said cause filed their report on May 5, 1925, in which report said commissioners assessed the property involved herein in the sum of $7.50.

On September 21, 1925, the Court approved the report of said commissioners and rendered final judgment in said cause, wherein the property involved in this suit was assessed the sum of $7.50.

On July 31, 1935, appellant The City of St. Louis filed a motion in the Circuit Court for special execution and said Court ordered such execution issued and the same was issued returnable to the September Term, 1935, of said court. On September 14, 1935, the Sheriff sold said property to appellant Anne M. Evans for the sum of $85.00, as herein stated.

On March 7, 1936, appellant Anne M. Evans conveyed the said property to appellants Henry Ernst and Sarah Ernst, his wife, and on same date the appellants Henry Ernst and Sarah Ernst, his wife, executed and delivered to appellant Anne M. Evans a deed of trust on said property for $3,000.00 and a second deed of trust on said property for $600.00.

On December 20, 1937, the Circuit Court rendered a decree in favor of plaintiff and against all defendants in said cause, rendering said sale by the Sheriff to appellant Anne M. Evans void and of no effect and canceling and holding for naught said Sheriff's deed. The Court also adjudged and decreed the deed from appellant Anne M. Evans to appellants Henry Ernst and Sarah Ernst, his wife, void and canceled nad held the same for naught. The Court also adjudged and decreed that said deeds of trust were void and canceled and held the same for naught.

The said defendants have appealed from the judgment and decree of the Circuit Court.

Assignments of Error.

I.

The Court erred in finding in favor of plaintiff and against all defendants.

II.

The Court erred in finding that neither the plaintiff nor her husband had actual notice in the cause entitled, "City of St. Louis v. Mary Rupp et al., No. 60,071," for the change of grade of Clayton and Kraft avenues in the City of St. Louis and that there was no evidence on which the Court could find that plaintiff's privies in title had any actual knowledge of the pendency of said suit for said change of grade for the reason that said plaintiff, or her predecessors in title, were duly notified by the commissioners appointed in said change of grade suit pursuant to Section 5 of Article XXI of the Charter of the City of St. Louis.

III.

The Court erred in finding that the plaintiff notified the Revenue Collector of the City of St. Louis of how she could be notified of taxes due on said property, in that said Collector of Revenue is a state officer and is charged with the duty of collecting general taxes and that said Collector has no connection with, or knowledge of, special benefits assessed against various real property in said City, and that such notification to said Collector is not binding on this appellant.

IV.

The Court erred in finding that it was the practice of the City of St. Louis to notify the property owners of its intention to sell the property to satisfy special assessment levies thereon, in that said notification, if any, was a mere courtesy on the part of the defendant City of St. Louis and that it is under no obligation to notify property owners whose property is assessed a benefit.

V.

The Court erred in finding that defendant City of St. Louis had good reason to believe that plaintiff did not know that said benefit judgment had been rendered against her property and that the City of St. Louis had caused special execution to be issued against her property to satisfy same, for the reason that said plaintiff was duly notified in accordance with Sections 5 and 8 of Article XXI of the Charter and Section 1198 of the Revised Statutes of 1929, respectively.

VI.

The Court erred in finding that defendant, Anne M. Evans, knew that plaintiff did not know her property had been sold and for the purpose of depriving plaintiff of her right to move the execution division of said Court to set aside said sale did not claim said property under said Sheriff's deed until the time within which plaintiff could file a motion to set aside the sale had passed, in that said plaintiff was duly notified that her said property would be sold by the Sheriff pursuant to notice published in accordance with Section 1198, Revised Statutes of 1929.

VII.

The Court erred in finding that defendant Anne M. Evans paid an unconscionably low price for said property at said Sheriff's sale.

VIII.

The Court erred in finding, adjudging and decreeing that plaintiff is entitled to the relief prayed and that plaintiff is the owner of the fee-simple title to the property involved herein, for the reason that plaintiff, or her predecessor in title, was duly notified of the proceedings in the suit for the change of grade pursuant to Section 5 of Article XXI of the Charter of the City of St. Louis and that said property was sold by the Sheriff of the City of St. Louis under a benefit judgment rendered in said change of grade

proceeding when said Sheriff's sale was conducted in accordance with the laws of the State of Missouri and particularly Section 1198, R. S. 1929.

IX.

The Court erred in finding, adjudging and decreeing that said property was sold without due process of law by the Sheriff in the City of St. Louis on the 14th day of September, 1935, under special execution issued at the office of the Clerk of the St. Louis Circuit Court.

X.

The Court erred in finding, adjudging and decreeing that said sale by the Sheriff was and is void and of no effect and that said sale constitutes a cloud on plaintiff's title to said property.

XI.

The Court erred in finding, adjudging and decreeing that said deed of the Sheriff to defendant Anne M. Evans is canceled and for naught held.

Points and Authorities.

I.

Respondent or her predecessors in title had due notice of the proceeding for the change of grade in which respondent's property was assessed a benefit by the commissioners appointed in said change of grade suit, which assessment resulted in a benefit judgment against respondent's property.

Section 5, Article XXI, St. Louis Charter;
St. Louis v. *Ranken,* 96 Mo. 497, 505;
Buddecke v. *Ziegenheim,* 122 Mo. 239, 243;
Eyssell v. *St. Louis,* 168 Mo., l. c. 616;
St. Louis v. *Calhoun,* 222 Mo. 44;
Schwab v. *City of St. Louis,* 310 Mo. 116;
Section 8, Article XXI, St. Louis Charter.

II.

Respondent's notice to the Collector of Revenue of the City of St. Louis where said respondent could be notified of taxes due on her property was not notice to appellant City of St. Louis with respect to special benefit assessments, as said Collector of Revenue is a state officer and said notice to said Collector was not binding on this appellant.

Section 9883, R. S. 1929 et seq.;
Section 10004, R. S. 1929.

III.

Appellant City of St. Louis is not under any legal obligation to notify property owners that their property is assessed a special benefit under Article XXI, of the Charter of the City of St. Louis.

IV.

Respondent was duly notified that said property was to be sold by the Sheriff pursuant to the notice of said sale in accordance with the statutes.

Section 1198, R. S. 1929.

V.

Respondent had the opportunity to move the Court, granting the motion of appellant for execution, to set aside the sale made thereunder during the return term.

City of St. Louis v. *Miller,* 82 S. W. (2d) 579;
City of St. Louis v. *Del Place Realty Co.,* 259 Mo., l. c. 140.

VI.

Inadequacy of price is not sufficient grounds to set the sale aside, especially since said sale was properly and fairly conducted.

Wagner v. *Phillips,* 51 Mo. 117;

Million v. *McRee,* 9 Mo. App. 344;
Walters v. *Hermann,* 99 Mo. 529, 12 S. W. 890;
Briant v. *Jackson,* 99 Mo. 585, 13 S. W. 91;
Knoop v. *Kelsey,* 121 Mo. 642, 26 S. W. 683.

VII.

The notice published by the commissioners pursuant to Section 5 of Article XXI and the sale under the special execution pursuant to Section 1198, R. S. 1929, constituted due process of law.

Lohman v. *Stocke,* 94 Mo. 672;
Harness v. *Cravens,* 126 Mo. 233;
Harper v. *Hopper,* 42 Mo. 124;
Young v. *Schofield,* 132 Mo. 650, 34 S. W. 497;
Buchanan v. *Atchison,* 39 Mo. 503.

Argument.

I.

Appellant City of St. Louis contends that the proceedings for the change of grade of Clayton avenue from Kraft avenue to the city limits were in due form and in accordance with the charter.

The petition for said change of grade proceeding was filed on November 8, 1922, which petition named as defendants therein all parties whose property was to be *damaged* as a result of said change of grade.

On October 14, 1924, the City filed its affidavit for an order of publication, and said order of publication was granted on said day for those "not found" and "nonresident" defendants whose property was proposed to be *damaged* by said change of grade.

On December 15, 1924, the Court appointed commissioners pursuant to Section 5 of Article XXI of the Charter to view the property to be damaged or assessed; fix a benefit or taxing district and publish a notice of

said benefit district in a newspaper for ten days before beginning their assessment; a notice of the boundaries of said benefit or taxing district; the time and place at which they would assess such damages and benefits and where they would hear evidence submitted by the parties interested. Said notice was published in the St. Louis Daily Record for a period of ten days from January 22, 1925, to and including February 2, 1925 (App. Abs., p. 78).

On May 5, 1925, the commissioners appointed in said cause filed their report, in which report said commissioners assessed against the property involved in this suit the sum of $7.50.

On September 21, 1925, the Court approved the report of said commissioners and entered final judgment in said cause wherein the said property involved was assessed a benefit judgment in the sum of $7.50.

The respondent or her predecessors in title were given due notice of the change of grade proceeding in accordance with Section 5 of Article XXI of the St. Louis Charter as disclosed in the record herein (App. Abs., p. 79).

Said section 5 of article XXI is as follows:

> "Section 5. The commissioners shall view the property to be taken, damaged or assessed; fix the benefit or taxing district; *publish in said newspaper for ten days before beginning their assessment a time and place at which they will assess such damages and benefits;* hear the evidence submitted by the parties interested; assess the damages and benefits as of the date said ordinance became effective and make report, in which at least *two commissioners shall concur* of such assessment in writing and under oath to the circuit court. In such report the compensation allowed to and the benefits assessed against each owner shall be separately stated. When the commissioners both assess benefits and allow damages against any one property owner they shall deduct the lesser from the greater."

Respondent or her predecessor in title owned property within the confines of the benefit district as set out in the published notice (App. Abs., p. 79).

It has been held in numerous decisions of this Court that property owners in the benefit district need not be made a party to the original summons in view of the fact that he has his notice and hearing at a later stage of the proceedings.

This Court has expressed itself with respect to notice in a condemnation proceeding in the case of *St. Louis* v. *Ranken,* 96 Mo. 497, l. c. 505, as follows:

> "The determination of the question, what property of the citizens will be benefited by a public improvement, is the exercise of legislative power, whether exercised by the Legislature directly or by municipal authorities to whom the power is delegated for that purpose, and *'due process of law is not essential to its legitimate exercise.'* These authorities may determine directly the district in which property will be benefited and the amount of the benefit, and erect a uniform standard for its apportionment therein. When a tax is to be assessed in proportion to benefits, the apportionment is a quasi-judicial proceeding in which, at some stage, the owner has the right to be heard upon the question of the amount to be assessed against his property before a charge therefor finally attaches thereto for its payment, and to notice not necessarily judicial in its character, but such as is appropriate to the nature and character of the proceeding, of his right to be so heard, *nor need such notice be personal.* The legislative authority may prescribe what the manner of the notice shall be; and when the statute provides for such notice and hearing, its terms must be complied with in order to a valid assessment, *and when the assessment is made in conformity with such requirements it is final, conclusive and binding.* Egyp-

tian Levee Co. v. Hardin, 27 Mo. 495; Newby v. Platte County, 25 Mo. 258; Garrett v. City of St. Louis, 25 Mo. 505; Cooley Const. Lim. 497, 505; Cooley on Tax. (2 Ed.) 637, sec. 5 et seq., and 653, sec. 6 et seq. and notes; In re De Peyster, 80 N. Y. 565; In re Zborowski, 68 N. Y. 88; People v. Smith, 21 N. Y. 595; Pearson v. Zable, 78 Ky. 170; Holt v. City Council of Somerville, 127 Mass. 408; Reclamation District v. Evans, 61 Cal. 104; McMillan v. Anderson, 95 U. S. 37; Davidson v. New Orleans, 96 U. S. 97; Hagar v. Reclamation District, 111 U. S. 701; Kentucky Railroad Tax Cases, 115 U. S. 321; Spencer v. Merchant, 125 U. S. 345; Lent v. Tillson, 72 Cal. 404; s. c. 19 A. & E. Corp. Cases 640.

"It will be observed that the Charter and ordinances governing in this case make provision for the erection of a taxing district, the assessment of especial benefits upon the property within that district in the proportion that the property of each owner is especially benefited by the public improvement, and for the apportionment of such special benefit among the several owners of such property, by the assessment against each separate piece of land of such owners of a tax equal to its proportionate share of such especial benefit, *and provides for appropriate notice to such owners of the creation of such district by the commissioners charged with that duty, of its metes and bounds, of the time when, and the place where, the commissioners, also charged with that duty, will proceed to make the assessment against the property in such district, and advising them of their right to be heard by the commissioners and by the Circuit Court upon the question of the amount of such assessment, and secures to them the right to be heard upon that question by the commissioners before the assessment is made, and by the Circuit*

Court upon exceptions thereto before it is made final and attaches as a lien upon the property assessed. By this legislation the right of the citizen to be heard before a charge is fixed upon his property is amply and carefully guarded. *It is not necessary that he should be made a party defendant by petition and summons in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-assessing branch of the proceeding, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the Charter and ordinances,* and an assessment made in strict conformity to their requirement is a valid assessment.

"And when the Circuit Court has taken final action upon the report of the commissioners, and the assembly has appropriated the money to pay the damages for the property taken, such assessment becomes final and conclusive upon the question of benefit to such taxpayers, and the amount of that benefit, the lien attaches to the property, *and these questions cannot be again raised in any subsequent suit that the city may find it necessary to bring to enforce that lien in order to collect the tax assessed.*"

The question of notice was further discussed in *Buddecke* v. *Ziegenheim,* 122 Mo. 239, l. c. 243, wherein this Court said:

"This case, in all of its salient features, is like that of Michael v. City of St. Louis, 112 Mo. 610, in which it is held that the question whether the city had, before the condemnation proceeding, acquired the property sought to be condemned could only be tried in such proceeding; and is not open for consideration in a suit to enforce the tax bills or to enjoin their collection; and that such ques-

tions are determinable only on exceptions being filed to the report of the commissioners appointed in the condemnation proceedings.

"While the record shows that plaintiffs were not made parties defendant to the condemnation proceedings against the property, *it does shows that they were duly notified as required by the City Charter* by five days notice in the paper doing the city printing of the establishment of the benefit district and the boundaries thereof in which property was to be benefited by reason of the opening of said street, and the time and place when and where the commissioners would proceed to assess said benefits, and that all persons interested were invited to be present. *It was not, therefore, necessary that they should have been made parties in the condemnation proceedings* to open the street (City of St. Louis v. Ranken, 96 Mo. 497), *or that they should have any other or further notice.* Moreover, every presumption is to be indulged in favor of the jurisdiction of a court of general jurisdiction, such as the Court before which the condemnation proceedings were had, *and the burden of proof rests upon him who asserts that it had not, to so make it appear.*"

In the opinion in *Eyssell* v. *City of St. Louis,* 168 Mo. 607, l. c. 616, this Court held as follows:

"And the fact that the owner of property charged with special benefits receives notice *only by publication does not militate against the validity of the assessment or the character of the order assessing benefits.*"

Further showing that the question of notice complained of by respondent has long since been fully disposed of, one

might peruse the opinion in *City of St. Louis* v. *Calhoun*, 222 Mo. 44, l. c. 53, which reads thus:

> *"Another contention is that certain property owners whose lands were not to be taken, but against whom benefits were to be assessed, were not brought into the Circuit Court by summons and for this reason the proceeding is void.*
>
> "This question was *fully determined* some years ago in the case of the City of St. Louis v. Ranken, 96 Mo., l. c. 507. In that case a party against whom benefits were assessed urged that he should have been made a party to the condemnation suit by summons from the Circuit Court, and that a mere notice from the City Counselor for him to appear at the time and place fixed for the assessment of benefits was insufficient. In that case we then said: *'It is not necessary that he should be made a party defendant by petition and summons in the condemnation proceedings.* It is *sufficient* if he is made a party defendant to the tax-assessing branch of the proceeding, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the Charter and ordinances, and an assessment made in strict conformity to their requirements is a valid assessment."
>
> "And in the late case of St. Louis v. Brinckwirth, 204 Mo., l. c. 303, we disposed of the *same question* in this language: 'In the case at bar defendants claim that the proceeding is void for two reasons: First, they say that they were not parties to the condemnation suit, and for that reason the entire proceeding is void. *This contention is not good.* None of their property was to be taken or was in fact taken. Their property simply abutted on one of the alleys to be established. Had the alleys required the appropriation of any part of their land then

> they should have been made parties to the condemnation branch of the proceeding. *Otherwise they did not have to have notice of this suit'* (City of St. Louis v. Ranken, 96 Mo. 497).
>
> "It therefore follows that *this contention* must likewise be ruled against the defendants."

A later decision by this Court with respect to notice of the benefit or taxing district to be published by the commissioners will be found in *Schwab* v. *City of St. Louis,* 310 Mo., l. c. 136, which is as follows:

> "Adverting to *Section 5 of Article XXI of the existing Charter of St. Louis,* we find that it is mandatory and obligatory upon the commissioners to 'publish in said newspaper (publishing at the time the notices of said Circuit Court) for ten days before beginning their assessment a notice of the boundaries of the benefit or taxing district and of the time and place at which they will assess such damages and benefits.' *The publication of such notice, when duly had, amounts to due process of law* and confers upon the Circuit Court jurisdiction to approve the commissioners' report assessing benefits against the property not taken or damaged" (St. Louis v. Ranken, 96 Mo., l. c. 507; St. Louis v. Calhoun, 222 Mo., l. c. 53).

Undoubtedly the decisions in the above-mentioned cases set at rest the question of notice.

The Court approved the commissioners' report and rendered final judgment thereon in accordance with Section 8 of Article XXI of the Charter. Said section is as follows:

> "The Court, upon approving the commissioners' report shall render final judgment thereon reciting the report and adjudging that the city have and hold the property petitioned for, describing the same, for

> the purposes specified, upon payment of the damages less the benefits assessed in each instance; *that so much of the report as is a judgment for benefits against specific property be a lien on such property for ten years* from entry of the judgment, and prior to all other liens thereon; and that the City recover the respective benefits in excess of damages assessed in each instance against private property with interest from date of judgment *and have execution therefor.*"

This Court has held that judgment rendered in accordance with said section 8 and pursuant to the notice published by the commissioners *is not subject to a collateral attack.* Said decision will be found in *Schwab* v. *City of St. Louis,* supra, which cites the case of *St. Louis* v. *Del Place Realty Company,* 259 Mo., l. c. 140, wherein the Court said as follows:

> "Thus finding that the publication of the five days notice prescribed by Section 1069, Ordinances of St. Louis, would give the commissioners jurisdiction to assess benefits and confer upon the Circuit Court jurisdiction to approve their report and render judgment thereon, *it follows that such judgment when entered is final and not subject to collateral attack. The aforesaid Charter specifically provides that the Circuit Court, upon the filing of the report of the commissioners, and the hearing of exceptions thereto, if any be filed, may render final judgment for such benefits. The specific power granted by the Charter to the Circuit Court to enter final judgments for benefits implies the power to make such benefits effective by the issue of execution thereon, there being no constitutional inhibition against the issue of such execution,* so that the contention of appellants that no final judgment can be rendered in this class of cases, and that no execution can be issued therein, is entirely untenable."

Appellant contends that the respondent herein or her predecessors in title were duly notified of said proceeding for the change of grade by virtue of the publication of notice by the commissioners as provided by Section 5 of Article XXI of the Charter and that *such notice was due process of law;* that said respondent is bound by said notice as disclosed by the decisions of this Court hereinabove quoted.

II.

The judgment and decree of the Circuit Court finds that shortly after the respondent herein acquired the property involved she became a resident of Kansas City, Missouri, and notified the Collector of the City of St. Louis of how she could be notified of taxes due on said property.

This appellant does not dispute or deny that respondent so notified the said Collector, but this appellant contends that such notice is not binding on the City of St. Louis.

The Collector of the Revenue is a state officer and as such is charged with the duty of collecting general taxes, *but not special benefit judgments.* The Comptroller of said City is the duly authorized and *only* official charged with the collection of benefit judgments.

The office of the Collector is governed by state statute, as will be determined by referring to Section 9883, R. S. 1929, which is as follows:

> "The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

It is also provided by statute that the City of St. Louis is in the same category as a county with respect to collectors (Sec. 9885, R. S. 1929).

It is conclusive that the Collector's actions or his failure to act with respect to special benefit judgments is *not* binding on the City of St. Louis, because in Section 10004, R. S. 1929, the duties of the Collector are therein outlined. Said section is as follows:

> "The collector of the City of St. Louis shall collect the *state taxes* in the limits of said city in the same manner and to the same extent, and do and perform all other things and matters appertaining thereto, as fully to all intents and purposes as now required, or which may be required, of the county collectors."

Article XXI covers fully the provisions for condemnation and the procedure in such cases, as held in *Tremayne* v. *City of St. Louis,* 6 S. W. (2d), l. c. 943, but there is not one word in said Article XXI that places the duty of collecting benefit judgments on the Collector of Revenue; any notification respondent might have given the Collector was of no concern of the City.

III.

The judgment and decree finds that it was the practice of the City to notify property owners of its intention to sell property to satisfy special benefit judgments, but nowhere in Article XXI will there be found any provision whereby property owners are to be notified of benefit judgments or of the City's intention to sell property to satisfy said benefit judgments, and any notification on the part of the City is a mere courtesy.

The testimony of G. J. Steiner, assistant division head in the Comptroller's office, will show that the City made every attempt to locate the respondent. On several occasions the letters sent to Mrs. Lindsay were not returned, but in one instance a letter sent on April 23, 1935, to W. A.

Thompson, as agent for respondent, was returned to the Comptroller's office the latter part of June, 1935. Mr. Steiner also testified that he could not locate Mrs. Lindsay and only succeeded in locating her agent after a period of ten years. Although it is not the obligation of the City to notify said property owners, it is definitely shown that the Comptroller's office made every effort to notify the respondent.

The judgment and decree of the Court is erroneous in finding that it was the practice of the City of St. Louis to notify property owners of its intention to sell their property to satisfy special benefit judgments, because if the testimony of witness Steiner is scanned from beginning to end it will not be found that such is the practice; furthermore, there is no showing that the respondent herein relied on the custom of the City to notify property owners when an execution is issued or that respondent had knowledge of such custom, because the evidence in this case is plain that respondent pleads ignorance of a judgment on her property.

IV.

Section 8 of Article XXI of the Charter provides that the proceedings under special execution "shall conform, as near as may be, to the proceedings under special executions on ordinary judgments foreclosing liens on lands."

With the above provision in view, the City, after waiting almost ten years for payment, moved the Court for an execution, which was granted on July 31, 1935, thereupon said execution was issued returnable to the September Term, 1935. By virtue of said execution the Sheriff levied on said property on August 20, 1935, and did on August 22, 1935, begin the publication of notice, as provided for by Section 1198, R. S. 1929, and continued said publication to and including September 14, 1935. Thereupon, pursuant to said notice, the Sheriff sold said property to respondent Anne M. Evans on September 14, 1935, for the sum of $85.00.

Said Section 1198 is as follows:

> "When real estate shall be taken in execution by an officer, it shall be his duty to expose the same to sale at the courthouse door, on some day during the term of the circuit court *of the county where the same is situated,* having previously given twenty days' notice of the time and place of sale, and what real estate is to be sold and where situated, by advertisement in some newspaper printed in the county which may be designated by the plaintiff or his attorney of record, if there be one regularly published, weekly or daily, and if not, by at least six printed or written handbills, signed by such sheriff, and put up in public places in different parts of the county; and the printer's fee for such advertisement shall be taxed and paid as other costs: Provided, that in all cities in this state now or hereafter containing one hundred thousand inhabitants or more, such sales shall be on the floor of the real estate exchange or at the courthouse door, as may be announced in said advertisement."

V.

The respondent herein having had due notice of the Sheriff's sale as provided by said Section 1198, it was incumbent on said respondent to move the Court granting the execution to set aside the said Sheriff's sale during the September Term, 1935.

This Court in the case of *City of St. Louis* v. *Miller,* 82 S. W. (2d) 579, reaffirmed its holding that the trial court had jurisdiction to set aside the Sheriff's sale under an execution during the whole of the return term.

In the case at bar the respondent collaterally attacks the judgment in the condemnation suit over ten years after judgment is rendered whereas she could have moved the trial court to set aside the Sheriff's sale, *City of St. Louis* v. *Del Place Realty Co.,* 259 Mo., l. c. 140. The respondent

or her predecessors in title were in the benefit district published by the commissioners pursuant to Section 5, of Article XXI. When the report of the commissioners was filed the respondent or her predecessors in title filed *no exceptions to the report,* as provided by Section 7, of Article XXI, then on September 21, 1925, judgment was rendered in favor of the City and against the property of *all* defendants who were assessed a benefit (including that of respondent). The respondent herein did nothing to protect her interest in the proceeding but proposed to wait for a period of over ten years before she attempted to take any action, then after the property was sold at the Sheriff's sale respondent collaterally attacked the judgment in the change of grade proceeding and at the same time succeeded in getting the trial court to set aside the sale made as a result of the execution issued under the change of grade judgment rendered September 21, 1925.

VI.

The trial court in its judgment and decree found that the appellant Anne M. Evans paid an unconscionably low price for said property.

The evidence shows that the sale referred to herein was conducted in the usual manner and that there were two bids, one made by the City and the other by Anne M. Evans. If there were no other bidders, the City would have purchased the property at the sale, but it would be useless for the City to bid any more than the benefit judgment and costs because, if the City purchases property at such a sale, the former property owner is entitled to redeem in accordance with Sections 1026 and 1027 of the Revised Code of the City of St. Louis 1926. The evidence shows that appellant Anne M. Evans was the only bidder other than the City, and it was not necessary for said appellant City of St. Louis to bid any higher than the bid made by appellant Anne M. Evans.

This Court has held that mere inadequacy of price is *not*

sufficient ground to set a sale aside, but that it must be coupled with other facts, as stated in *Wagner* v. *Phillips,* 51 Mo. 117. In that particular case bidders were kept away and competition was repressed, but there are no such circumstances in the case at bar.

In *Million* v. *McRee,* 9 Mo. App. 344, the St. Louis Court of Appeals held that inadequacy of price is not a ground for setting aside a sale unless so gross as to warrant a presumption of fraud. The Court upheld a sale for $5,000 on property which was valued at from $15,000 to $18,000.

The case of *Walters* v. *Herman,* 99 Mo. 529, 12 S. W. 91, was one where the property involved was sold by the Sheriff to the respondent for $210. The respondent transferred the bid and had the bid made to respondent Short. Short sold to respondent Robertson for $2,500. Robertson then sold to respondent Terminal Railroad Company for $4,000, which consideration, except that of the Sheriff to Short, was alleged to be wholly false. This Court, however, upheld the sale and stated in its opinion as follows:

> "The only thing left, therefore, for consideration is as to the sale and the rights of the subsequent purchasers. *Mere inadequacy of price is insufficient to set aside a judicial sale.* There must be some fraud in the transaction as a general rule, where the sale is open and no improper practices are shown on the part of the purchaser unless the inadequacy is so gross as per se to amount to prove fraud in one of its numerous manifestations on the part of the purchaser. Phillips v. Stewart, 59 Mo. 491, and cases cited; 2 Pom. Eq., Secs. 926, 927; Davis v. Dreisback, 81 Ill. 393."
>
> "But granting that there was inadequacy of price at the tax sale, and gross inadequacy at that, there is nothing in the allegations of the petition which connects the subsequent purchasers with that inadequacy of price, or with notice thereof. The state-

> ment made that the various considerations mentioned in the other deeds, also sought to be set aside, were 'wholly false' certainly has no such tendency. Such an allegation is a long shot away from charging that the subsequent purchasers were mere volunteers, paying no consideration, whatever, for their purchases. Very often a larger consideration than that actually given is frequently inserted in instruments of conveyance, with the view to obtain a larger price from some future purchaser; but there is no fraud in that as against the former owner."

In the case at bar no doubt the low bid was occasioned for the reason that there were few bidders at the sale, and, as a consequence, it was not necessary for appellant Anne M. Evans to make a higher bid than the one for which she purchased the property. However, this Court, in *Briant* v. *Jackson,* 99 Mo. 585, 13 S. W. 91, stated as follows:

> "The evidence varies somewhat as to the value of the land but a fair average would make the value perhaps about $8,000.00. The amount bid, to wit, $900.00, is obviously a very low and inadequate sum, *but mere inadequacy is not enough,* though a circumstance of great weight. Robinson v. Robards, 15 Mo. 459."

The policy of the law is to *uphold* execution sales and secure the purchaser a good title and to the creditor and bidder the best possible price for property sold, as held in *Knoop* v. *Kelsey,* 12 Mo. 642, 26 S. W. 638. This Court also in the *Kelsey* case, supra, in speaking of inadequacy of price, stated as follows:

> "It may also be said, as well settled, that, while gross inadequacy of the price paid for land at a sheriff's sale may be a badge of fraud, *it is not sufficient alone to avoid the sale.* When such a sale

> is properly attacked, it is the duty of a court of equity to examine carefully all the circumstances, under which it is made, and very slight evidence of fraud, or unfairness, on the part of the officer making the sale, may be sufficient to demand its cancellation. Briant v. Jackson, supra; Phillips v. Stewart, 59 Mo. 942. There are rare and exceptional cases in which the inadequacy is held to be so gross as to amount to a flagrant abuse of judicial process, *and equity has granted relief on that ground alone.* Brown v. Railroad, 43 Mo. 294; Cobb v. Day, 106 Mo. 300, and cases cited; Walters v. Hermann, 99 Mo. 532."

In the instant case the evidence will disclose that there was no unfairness on the part of the Sheriff making the sale; neither was there any repression of bidders nor any attempt to discourage bidders or to keep them away from the sale.

Appellant submits that, under the circumstances herein, the sale made by the Sheriff should not be set aside, particularly for the reason that, if said sales are set aside for mere inadequacy of price, the appellant City would have no recourse in the collection of its benefit judgments. In other words, if the judgment of the lower court is affirmed, all defendants in condemnation proceedings would have an incentive to refrain from paying said benefit judgments, knowing that if they refused and failed to pay that, upon an execution on said judgments, if the bid were small, they would have every reason to believe that the sale would be set aside.

VII.

As heretofore pointed out, under Point I, the respondent or her predecessor in title had *due notice* of the change of grade proceeding by virtue of the commissioners' notice published pursuant to Section 5 of Article XXI of the Charter.

Although the respondent in her petition alleged that she was a citizen of the State of Missouri at the date of the issuance of the execution and at the time of the sale, and that no written notice was served on her of the issuance of said execution or to what county directed, and to what term of court said execution was returnable, as required by Section 1200, R. S. 1929, the judgment and decree is *not* in conformance with the petition in that respect, due to the fact that the said decree finds, adjudges and decrees "that plaintiff's said property was sold without *due process of law* by the Sheriff of said City," which finding is meaningless because of its generality. Nothing will be found in said decree that held the respondent was not served in accordance with Sections 1200 and 1201, R. S. 1929; neither is there any reference to said sections in the decree; however, anticipating that respondent will refer to said sections in her brief, we feel that it would not be amiss to provide this Court with pertinent cases on that particular proposition.

It was shown at the trial of this cause that the Sheriff caused to be published the notice of the execution sale in accordance with the statutes.

The judgment in the instant case was rendered in the Circuit Court of the City of St. Louis *against property in the City of St. Louis,* and the execution was issued *in the City of St. Louis against property situated in the City of St. Louis,* and was sold by the *Sheriff of the City of St. Louis.*

It has been demonstrated by decisions of this Court that section 1200 does not apply in the instant case.

From the decision in the case of *Lohman* v. *Stocke,* 94 Mo. 672, it is apparent that section 1200 does not apply to the case at bar where the *judgment* and *execution* issued in the city (county) where the land is situated. The Court said in that case as follows:

"On the trial defendants objected to the introduc-

tion of any evidence, stating as the ground of objection that it did not set forth a cause of action, in that it did not appear that the notice required by Revised Statutes, section 2381, where real estate is situated in a different county from that in which defendant in the execution owning such real estate resides, was given. The objection was properly overruled if for no other reason than that one of the executions on which the sale was made, issued on a judgment which was *rendered in the county where the land sold was situated.* In Harper v. Hopper, 42 Mo. 124, it is held that the provision of the statute which requires notice to be given to a defendant, where an execution is issued to a county other than that in which he resides, *has been uniformly held to apply only to cases where the execution is sent to be levied on land in a county different from that in which the judgment was rendered and execution issued.* Harris v. Chouteau, 37 Mo. 165; Buchanan v. Atchison, 39 Mo. 503."

The same ruling was made in the case of *Harness* v. *Cravens,* 126 Mo. 233, wherein the Court said as follows:

"But this court has frequently decided that where a party has been personally served with process, or, though resident in a different county, engages in litigation in a county where he has land, and a judgment against him results, that there, having been virtually notified by such judgment, he needs no formal notice that execution will issue, for this he may expect. Harris v. Chouteau, 37 Mo. 165; Hobein v. Murphy, 20 Mo. 447; Buchanan v. Atchison, 39 Mo. 503; Ray v. Stobbs, 28 Mo. 35; Harper v. Hopper, 42 Mo. 124."

In *Harper* v. *Hopper,* 42 Mo. 124, the Court held that section 1200 applies to cases where execution is to be

levied on land situated in a county *different than that in which judgment was rendered and execution issued.*

Further discussing the subject, this Court, in *Young* v. *Schofield*, 132 Mo. 650, 34 S. W. 497, said as follows:

> "Next followed the case of Harris v. Chouteau, 37 Mo. 165, where the parties plaintiff and defendant all resided in Jackson County. Plaintiff sued defendants, had personal service on defendants, and they appeared and defended the action which resulted in judgment against the defendants. After process was served on defendants, one of them removed to Ste. Genevieve county. Subsequent to this, execution was issued in the county of the judgment's rendition, and levied upon land of the removed defendant, and it was afterward sold, etc., but no notification was had upon her, and *it was held she was entitled to none,* Wagner, J., observing: 'If the judgment creditor is so disposed he may issue his execution to a remote county, have the land of his debtor levied on and sold, and possibly buy it in at a great sacrifice, if the owner is not notified so that he can be there and protect his rights. It was to prevent this unconscionable advantage from being taken that the law was enacted. *But where a party is brought into court by personal service, and judgment taken against him, and execution issued to the sheriff of the same county in which the judgment is had, he is certainly fully notified of all the proceedings.*'
>
> "So, too, in Buchanan v. Atchison, 39 Mo. 503, the defendant was sued, personal service had, and judgment obtained against him, and afterward he removed to another county, and his land in the county in which judgment was rendered was sold, it was held for reasons similar to those already given, he was entitled to no notice.

"Likewise, in Harper v. Hopper, 42 Mo. 142, a similar ruling as heretofore mentioned was made where a defendant was resident of a county other than that in which the action was brought, but he appeared to the action and made defense, and this was held tantamount to personal service, Wagner, J., after citing the two cases already noticed in 37 and 39 Mo., saying: 'There is nothing in the present case to distinguish it from those referred to. Although the defendant did not reside in Polk county when the judgment was taken, yet he appeared and defended the suit. The execution was issued to the sheriff of that county, and the land levied on and sold was situated in the same county. He then had sufficient notice that an execution would issue to that county, and he cannot bring himself within the mischief intended to be remedied by law in reference to executions.'

"These cases established beyond question the rule that the strict letter of the statute, section 4943, in so far expanded by construction as to embrace all cases where a defendant being personally served with process in a county where he resides and has land, or personally served, etc., in a county where he has land, or, being sued in a county other than that of his residence, he appears to and defends the action, having land in such county, that, in all such instances *that section as to notice does not apply.* This is the utmost limit to which the letter of the law guided by its reason has been extended by this court in the cases already cited."

In *Buchanan* v. *Atchison,* 39 Mo. 503, the Supreme Court held that a party who changes his residence and removes from the county after the commencement of a suit is *not* entitled to notice under section 1200.

Although some of the cases above cited are cases where personal service was had, it is our contention that the same situation prevails in the case at bar with respect to the character of service.

The application of section 1201 is of no avail in this suit and said section 1201 falls with section 1200.

Conclusion.

Appellant City of St. Louis submits that the action and ruling of the Circuit Court is erroneous in setting aside and holding for naught the Sheriff's sale to appellant Anne M. Evans in view of the fact that the respondent or her predecessors in title received due notice of the change of grade proceedings.

It is also our contention that the sale to appellant Anne M. Evans by the Sheriff was conducted according to the statutes and was not without due process of law.

We also contend that the finding of the trial court that the property involved herein sold for an unconscionably low price is without merit, in view of the fact that said sale was devoid of fraud and conducted fairly and in the usual manner.

In view of the decisions of this Court with respect to the issues in the case at bar, the decree and judgment of the Circuit Court should be reversed.

Respectfully submitted,

E. H. WAYMAN,
JNO. T. HICKS,
FRANCIS J. SULLIVAN,
Attorneys for Appellant,
The City of St. Louis.